

BEFORE THE THREE MEMBER DUE PROCESS PANEL

PURSUANT TO RSMO SECTION 162.961

, et al., )

)

Petitioners, )

)

v. )

)

DUNKLIN R-V SCHOOL DISTRICT, )

)

Respondent. )

HEARING DECISION

Student's Name:

Parents' Name:

Representative: Ms. Dayna Deck

Attorney at Law

6609 Clayton Road, Suite 1E

St. Louis, MO 63117

Local Education Agency: Dunklin R-V School District

277 Barclay

Herculaneum, MO 63048-0306

**Representative: Ms. Teri B. Goldman**  
**Attorney at Law**  
**Mickes, Tueth, Keeney, Cooper,**  
**Mohan & Jackstadt, P.C.,**  
**425 South Woods Mill Road, Suite 300**  
**St. Louis, MO 63017**

**Hearing Dates: April 27, April 30 and May 1, 2001**  
**Date of Decision: June 1, 2001**  
**Hearing Panel: Ms. Jean Adams,**  
**Mr. Patrick O. Boyle, Chair, and Dr. Richard Staley**

### **ISSUES AND PURPOSE OF THE HEARING**

The issues considered by the panel were set forth in the student's amended request for due process dated August 24, 2000 as supplemented by the student's statement of issues dated January 29, 2001. Student's initial request for due process was limited to the 1999-2000 school year and, the amended request added the 2000-2001 school year. This decision covers only the 1999-2000 school year as the panel held that the request to review the 2000-2001 school year was filed prematurely.

Student raised issues under Section 504 of the Rehabilitation Act and the A.D.A. Such issues are beyond the jurisdiction of this panel and, this decision is limited to a determination of whether the student was provided a free appropriate public education during the 1999-2000 school year under an I.E.P. developed at an IEP team meeting on April 21, 1999.

Student specifically questions the following:

Was student's cognitive ability properly evaluated for the purpose of developing an IEP?

Were appropriate reading goals included in student's IEP?

Should counseling or social skills goals have been included in the student's IEP?

Should language therapy have been included in the student's IEP?

Were vocational goals in the student's IEP appropriate?

Should extended school year services have been included in student's IEP?

Was appropriate assistive technology provided under the student's IEP?

Did the LEA provide FAPE under the IEP during such time as the student was unable to attend scheduled classes due to a break down of the school's wheel chair lift?

Did the LEA provide adaptive physical education under the IEP?

### **TIME LINE INFORMATION**

Student's request for due process was received by the SEA on August 7, 2000.

On September 7, 2000 the time for decision was extended to November 14, 2000 at the student's request. Time for decision was further extended to February 9, 2001 on October 18, 2000 by consent of all parties. A hearing was commenced on January 16, 2001 and, continued for clarification of the issues. Time for decision was extended to March 30, 2001 at student's request.

On March 7, 2001 time for decision was extended to June 1, 2001 at the LEA's request and, the LEA's Motion for a more definite statement of issues was set for hearing on March 14, 2001. The panel heard arguments on March 14, 2001 and issued an order limiting the hearing to the 1999-2000 school year on the issues set forth in student's amended request for due process as supplemented by student's statement of issues dated January 29, 2001. A hearing was held on April 27, April 30 and May 1, 2001. This decision is rendered on June 1, 2001.

### **FINDINGS OF FACT**

1. This matter involves generally the issue of whether the LEA (the "District") offered student a free appropriate public education ("FAPE") pursuant to the Individuals with Disabilities Education Act ("IDEA") during the 1999-2000 school year. (March 14, 2000 Hearing Transcript; Ex. R-110).

2. This matter is now before the three-person due process hearing Panel pursuant to 20 U.S.C. Section 1415 and RSMO Section 162.961.
3. A due process hearing was held on April 27, 30 and May 1, 2001. The Panel continued the hearing beyond the forty-five day statutory timeline at both parties' requests. The Panel was comprised of Patrick Boyle, Esq. (Chairperson); Dr. Richard Staley (the District's hearing officer selection); and Jean Adams (student's hearing officer selection). Petitioners were represented by attorney Dayna Deck and the District was represented by attorneys Teri B. Goldman and John Brink. Each party had the opportunity to call and cross-examine witnesses. Witnesses were sequestered and the hearing was closed at Petitioners' election. A court reporter was present and made a full record of the proceedings.
4. Respondent's Exhibits R-1 through R-49, R-51, R-53-57, R-59, R-61, R-62, R-66-70, R-73, R-75, R-76, R-79, R-86, R-90, R-91, R-94-98, R-100, R-102, R-103, R-109 and R-110 were admitted by stipulation of Petitioners' counsel. Respondents' exhibits R-89, 92, 101, 104-08 were admitted, but with Petitioners' counsel reserving objection. Petitioners' counsel did not request admission of any of Petitioners' exhibits.
5. The following individuals testified at hearing on behalf Petitioners: A , student's father; B, student's mother; and Mary Estrand, admitted as an expert witness over Respondent's objection. The following individuals testified on behalf of Respondent: Marsha Brown, the District's special education administrator and student's teacher for fourth-sixth grades; Connie Mantia Crader, former District middle school principal; Midge Hammon, District special education teacher; Mindy Ellis McDonald, District special education teacher; Wendy Park, District regular education teacher; Sheila Schaeffer, physical therapy assistant; and Kindra Tudor, District speech language implementor.
6. Student is a fifteen-year old (DOB: 2-17-86) who attended District schools during the 1999-2000 school year, but who resided in and continues to reside in a school district other than the District here involved.

7. Student attended the District during the 1999-2000 school year as a nonresident student whose mother was then a teacher in the District. Student's mother's teaching contract was nonrenewed by the District. Student's mother and student filed claims in Federal District Court. Student attended the District during the 2000-01 school year as a nonresident student pursuant to an injunction entered by the Federal District Court.

8. Student has disabilities for purposes of the IDEA. 20 U.S.C. Section 1400 et seq.

9. Student first began attending the District during kindergarten in the fall of 1991. (Ex. R-1). At that time, student was diagnosed pursuant to the IDEA as physically handicapped/other health impaired due to a medical diagnosis of cerebral palsy. (Ex.

R-1). During the 1991-92 school year, student attended the regular kindergarten classroom in the morning and a special education classroom in the afternoon. (Ex. R-1). At that time, student received the related services of speech therapy, occupational therapy and physical therapy. (Ex. R-1, 2). The IEP developed for the 1991-92 school year notes that student is ambulatory with a walker for short distances, is a happy, well adjusted child who is liked by peers and often appears to be extremely tired. (Ex. R-2)

10. During the 1992-93 school year, student's IEP team determined that student should repeat kindergarten, but was ready for the regular kindergarten curriculum. (Ex. R-3) At that time, student's speech-language pathologist was Winnie Long. (Ex. R-3) The IEP for that year places student in the regular classroom with itinerant speech/language therapy and occupational therapy. (Ex. R-3)

11. During the 1993-94 school year, student received special education services in a nongraded primary program. (Ex. R-5) As Marsha Brown, the District's special education director testified at hearing, the elementary school was entirely nongraded with students engaging in academics at the level they were achieving. Winnie Long continued to serve as student's speech-language therapist. (Ex. R-

5) The IEP team that developed student's IEP for the 1993-94 school year determined that, due to fine motor concerns resulting from cerebral palsy, student should be evaluated for an alternative writing system such as a keyboard. (Ex. R-5 at 46)

12. In May 1994, student was reevaluated and a reevaluation report was prepared to reflect the results of that reevaluation. (Ex. R-7) The reevaluation report notes that student was currently in the first grade and was receiving instruction in the regular classroom. (Ex. R-7 at 61) At that time, the multidisciplinary team concluded that a nonverbal test of intelligence on which student received an IQ of 98 was a valid indicator of cognitive ability. (Ex. R-7 at 62) The team also concluded that student showed signs of a learning disability. Speech-language pathologist Winnie Long was a member of the team that prepared the reevaluation report. (Ex. R-7 at 70)

13. Student's IEP team prepared an IEP for the 1994-95 school year on or about May 26, 1994. (Ex. R-8) Winnie Long was a participant in that meeting. (Ex. R-8 at 71) The present level of that IEP notes that the District had purchased an electric typewriter for student's use in the classroom and that student was learning keyboarding skills. (Ex. R-8 at 76) Indeed, the IEP developed for second grade contains goals and objectives, inter alia, in the area of keyboarding skills. (Ex. R-8 at 82) That IEP places student in 1545 minutes per week of regular education with 330 minutes per week in physical therapy, occupational therapy and speech language therapy. (Ex. R-8 at 87)

14. On or about August 28, 1995, student's IEP team prepared an IEP for the 1995-96 school year. Sheila Schaefer, student's physical therapy assistant, was present at and participated in the meeting. (Ex. R-10 at 91) The IEP calls for 1125 minutes per week in regular education, 450 minutes per week in a learning disabilities resource classroom and the related services of occupational therapy, physical therapy and speech language therapy. (Ex. R-10 at 91) Student's placement was changed to include resource instruction because educational performance in the regular classroom revealed that student required more

individualized attention. (Ex. R-10 at 112) The present level of performance for that IEP notes that, although student prefers to write rather than type, student is to be encouraged to use the typewriter or computer for written work. (Ex. R-10 at 93) The present level further notes that student has increased sight word reading skills, but depends primarily on sight recognition, rather than use of phonics, in reading. (Ex. R-10 at 93) Student's IEP reflects that progress was made during the school year on goals and objectives in reading and written language, among other areas. (Ex. R-10 at 107, 129-31)

15. On or about August 28, 1996, student's IEP team met to prepare an IEP for the 1996-97 school year. Among the participants were Sheila Schaefer, Marsha Brown, and Winnie Long. (Ex. R-13 at 133) Marsha Brown as student's special education teacher from fourth grade through sixth grade. During that meeting, student's IEP team determined that student was not in need of extended school year. (Ex. R-13 at 133) The present level of performance of the 1996-97 IEP notes that student was receiving resource room services in the areas of reading and language. In addition, the present level notes that student has begun to use decoding skills when presented with new words and that student can answer literal and some inferential comprehension questions about stories. (Ex. R-13 at 135) Student's IEP contain goals and objectives in language, reading, phonics, keyboarding, physical therapy, and speech-language. (Ex. R-13) The IEP notes progress by the end of the year in all areas. (Ex. R-13 at 151) Significantly, the IEP also notes that Winnie Long, the speech-language therapist, recommended that student exit language therapy on or about May 20, 1997 because student had mastered the goals and objectives. However, Ms. Long recommended that student continue to be placed in speech therapy for articulation errors. (Ex. R-13 at 152) In addition, on or about March 19, 1997, Student's team determined that student no longer needed itinerant services in the area of keyboarding as all goals in that area had been met. (Ex. R-14) More specifically, the team concluded that student had "reached a level of independence in keyboarding that negates the necessity to be pulled out of class." (Ex. R-14 at 158)

16. On or about April 2, 1997, student's IEP team notified the parents of the District's intent to conduct a reevaluation. (Ex. R-15) However, at that time, the team concluded that additional cognitive testing was unnecessary because student had already completed two IQ tests. (Ex. R-15)

17. On or about May 8, 1997, the diagnostic team prepared a diagnostic summary to reflect the results of the three-year reevaluation. (Ex. R-17) That diagnostic report indicates that, at the time, student's mother, was a teacher in the District. (Ex. R-17 at 167) The diagnostic summary further indicates that student has used a walker since the fall of 1988 and also used a wheelchair, particularly after a hip operation in 1996. (Ex. R-17) In addition, the report reflects that Winnie Long administered standardized language assessments to student. Based on the results of that testing, the team concluded that student no longer qualified for language therapy, but still qualified for speech therapy. (Ex. R-17 at 170) In the social/emotional/behavioral area, the diagnostic summary reflects that student is well liked by peers and is pleasant and cooperative. (Ex. R-17 at 170) Student was receiving A's and B's in courses at that time. (Ex. R-17 at 171) In the conclusion, the team determined that student continued to benefit from speech and language services, physical therapy, special classes in reading and written language, and classroom modifications in spelling. (Ex. R-17 at 173) Marsha Brown and Winnie Long were members of the diagnostic staffing team. (Ex. R-17 at 174)

18. On or about May 14, 1997, Student's IEP team prepared an IEP for 1997-98 school year at which time student would be in fifth grade. (Ex. R-18 at 177) The present level of performance of the IEP notes that, although the 1997 diagnostic summary indicated that student no longer qualified for language therapy, the team determined that student should have language therapy 90 minutes per week. (Ex. R-18 at 178) Marsha Brown was student's resource teacher in fourth grade. At that time, as reflected in the present level of performance, student was reading at the second and third grade level. (Ex. R-18 at 178) The 1997-98 IEP contains goals and objectives in written language, reading comprehension,



spoken language, speech articulation, and physical therapy. The IEP also reflects the team's determination that student did not qualify for extended school year services because student was unlikely to significantly regress during vacation periods. (Ex. R-18 at 199) The IEP places student in 1265 minutes per week of regular education, and 610 minutes per week of special education, including physical therapy and speech-language therapy. (Ex. R-18 at 200) Marsha Brown and Sheila Schaeffer were among the IEP team participants. (Ex. R-18 at 204)

19. On or about May 8, 1998, student's IEP team met to prepare an IEP for the 1998-99 school year. (Ex. R-24) The present level notes that student was receiving reading and language services in the resource room. However, after the first semester of fifth grade, student transitioned to a class within a class setting for language. (Ex. R-24 at 258) The present level also notes that student has an excellent personality and has a positive approach. (Ex. R-24 at 258) In addition, the present level notes that student has paraprofessional assistance when needed and that student continued to make very good progress in reading, although continued work is needed with word attack skills. (Ex. R-24 at 258) At the time the IEP was prepared, student was reading at a fourth grade level. (Ex. R-24 at 25) The IEP noted that student's strengths were in the area of math and socialization. (Ex. R-24 at 259) That IEP also provided for student to use a portable typewriter and called for 1240 minutes per week in regular education within 635 minutes per week in special education, including resource instruction, physical therapy and speech therapy. (Ex. R-24 at 261-62) The IEP contains goals and objectives in physical therapy, reading, written language, spoken language, and speech articulation. (Ex. R-24) Notably, the IEP indicates that student was not eligible for extended school year because significant regression was unlikely to occur. (Ex. R-24 at 261) Participants in that IEP meeting included Marsha Brown, Midge Hammon, Sheila Schaeffer and Winnie Long. (Ex. R-24 at 281)

20. In April 1999, student participated in a group administration of the standardized TerraNova Test. (Ex. R-89) At that time, student was in the seventh month of the sixth grade year. Student scored at the fourth grade level in reading on the Terra Nova. (Ex. R-89)

21. On or about April 21, 1999, student's IEP team met to prepare an IEP for the seventh grade year (1999-2000). (Ex. R-26) The present level of that IEP notes that student has cerebral palsy which causes difficulty with fine and gross motor skills. (Ex. R-26 at 284) The present level also notes that student was receiving services for language in a CWC setting, that paraprofessional assistance was received and that the grades in language during sixth grade consisted of A's and B's. (Ex. R-26 at 284) The present level also indicates that, in the regular classroom, student gets along well with peers, is well adjusted and fits in well socially. (Ex. R-26 at 284) At that time, student was receiving A's and B's in regular education classes of spelling, math, science and social studies. (Ex. R-26 at 284) Student also attended a life skills class in which the teacher noted student was always cooperative and related well with peers. (Ex. R-26 at 285) Moreover, in resource reading class, student was working on a fourth grade level in vocabulary and was receiving an 89% in reading comprehension. (Ex. R-26 at 285) The teacher noted that literal comprehension reading skills were better developed than inferential skills. (Ex. R-26 at 285).

22. In addition, in the April 21, 1999 present level of performance, the IEP notes that, during the 1998-99 school year, student received a "double dose" of language services through a class within a class and individual language therapy. (Ex. R-26 at 286) At that time, student had mastered all language goals and objectives and received A's and B's in language art class. (Ex. R-26 at 286) Based on her observations of student in therapy as well as classroom grades, Winnie Long concluded that student no longer required language therapy, but should continue only with CWC language class. (Ex. R-26 at 286) However, Ms. Long also noted that student should continue in speech therapy for articulation

errors. That change in the delivery of student's services was agreed to by parents. (Ex. R-26 at 286)

23. The April 21 IEP includes modifications including oral testing, no penalty for spelling errors, reduced paper and pencil tasks, note taking assistance, shortened assignments, and part-time paraprofessional assistance. (Ex. R-26 at 288) The IEP also calls for adaptive physical education and a scanner and the use of classroom computer as assistive technology. (Ex. R-26 at 288, 290) The IEP team concluded that, at that time, student was not eligible for extended school year. (Ex. R-26 at 290) Significantly, the IEP notes that "student's parents have expressed concern with the regular classroom placement for the coming year and wish lunch to be brought to the classroom. Peers will be allowed to eat lunch with student." (Ex. R-26 at 291) The IEP includes goals and objectives in seventh grade writing skills, reading comprehension, life skills, speech articulation, vocabulary and physical therapy. Handwritten progress notes demonstrate that student was meeting or making progress with respect to those goals and objectives. (See also Ex. R-109) The April 21 IEP places student in 1085 minutes per week of regular education, 300 minutes per week of CWC language, 175 minutes per week in resource reading, 175 minutes per week in life skills, 60 minutes per week of physical therapy and 80 minutes per week of speech therapy. (Ex. R-26 at 297) IEP team participants included student's mother, Winnie Long, Connie Mantia, Midge Hammon, Marsha Brown, and Sheila Schaefer. (Ex. R.-26 at 305)

24. During the 1999-2000 school year, student received predominantly A's and B's in regular and special education classes. (Ex. R-90) As explained at hearing, student's grades were not modified pursuant to the IEP. In regular education classes, student was graded as were peers, but with the implementation of the modifications agreed to by the IEP team. In special education classes, student's grades were based, in part, on progress with respect to IEP goals and objectives.

25. At hearing, student's mother testified that student gets along well with peers and adults, that she agreed with student's removal from language therapy in April

1999, and that she agreed with the goals and objectives contained in April 21 IEP both at the time the IEP was developed and during the course of the year. (Ex. R-105) In addition, student's mother testified that student made progress during the 1999-2000 school year and "learned a lot." (Ex. R-105)

26. In the Fall of 1999, the chair lift that was used to transport student and the wheelchair from the main level to the middle level broke. Shortly thereafter, the District installed a stair climber to transport student between those two levels while the repair company located a part necessary to repair the chair lift. At hearing, student's parents implied that student missed class for as much as two months during the time that the chair lift was broken. However, student's parents failed to mention that the District quickly installed a stair climber. Indeed, Midge Hammon, a special education teacher whose classroom was on the main level, testified that student attended classes in her classroom during this period for no less than one week and no more than two weeks. During that short period of time, some of student's teachers brought their classes into Ms. Hammon's room. With respect to other classes, student's teachers ensured that student's work was brought to student and Ms. Hammon was able to spend 1:1 time with student to ensure that no work was missed.

27. On or about January 19, 2000, Connie Mantia, student's mother, Sheila Schaefer and Terry Owen, the middle school counselor, met and determined that student would not receive physical education from January 20, 2000 until end of the school year, but would instead have physical therapy at that time. (Ex. R-26 at 289)

28. On or about February 11, 2000, student's parents, Ms. Hammon, Ms. Ellis-McDonald and Mr. Owen met to discuss some difficulty that student apparently was having in physical education class that prompted the changes agreed to in the January meeting. (Ex. R-28) At hearing, Connie Mantia Crader provided undisputed testimony that student was provided with adaptations in regular physical education class prior to the parent's request that student be removed after an alleged January incident.

29. On or about March 24, 2000, student's IEP team reconvened to discuss the need for a reevaluation and to discuss whether the parents wanted student to be placed back in the regular physical education class. The team also discussed parental concerns relating to student's use of the cafeteria. (Ex. R-30, 34) At that meeting, student's father request the District to rent an additional stair climber so that student could now join peers for lunch in the cafeteria. In response, Mrs. Crader suggested that another option might be to use a small bus to transport student to the cafeteria. (Ex. R-30, 34) In addition, with respect to the need to conduct a reevaluation, student's father requested that the County Cooperative conduct the physical therapy evaluation. The team agreed that student did not require another IQ test and further agreed that student should be administered achievement tests. (Ex. R-30, 34)

30. On that same day, Mrs. Crader investigated the use of a stair climber for access to the cafeteria. (Ex. R-31)

31. The District scheduled a follow-up IEP meeting for March 30, 2000. However, on March 29, student's father informed the District that the family no longer wanted to have a meeting regarding returning student to physical education class and cancelled the March 30 meeting. (Ex. R-33)

32. On March 30, the IEP meeting was not held. However, Mrs. Crader and Marsha Brown met informally with student's father. (Ex. R-34) At that time, student's father informed District personnel that he wanted student to proceed with physical therapy as scheduled and not return to regular physical education. He did indicate that he now wanted student to begin eating lunch in the cafeteria and agreed with Mrs. Crader that the bus was a better means of transporting than the stair climber. Mrs. Crader immediately arranged for that transportation to begin April 3. (Ex. R-34)

33. On April 3, 2000, school staff developed a reevaluation plan to correspond with the March 24 IEP team discussion regarding a reevaluation. (Ex. R-35) The plan includes testing in physical therapy, achievement and speech. (Ex. R-35) A notice of reevaluation and a parental consent form and list of tests to be

administered were sent to the parents on April 3. (Ex. R-35 at 329) When the District did not receive a response to the request for consent to reevaluate, Mrs. Crader sent a second notice on or about April 28. (Ex. R-37 at 333)

34. On or about May 1, 2000, the District scheduled an IEP meeting for May 8 to discuss the reevaluation and a new IEP. (Ex. R-39)

35. On or about April 3, student's father responded by correspondence to the District's request to reevaluate. (Ex. R-30) In that correspondence, student's father requested an explanation of the tests to be conducted. (Ex. R-40) At hearing, Mrs. Crader testified that such explanation was provided at the May 8 IEP meeting.

36. In addition, in his April 3 correspondence, student's father included a list of items that the parents wanted to be included in student's next IEP. (Ex. R-30 at 340-41) At hearing, student's mother testified that each of those items was incorporated into the IEP written on May 8.

37. On May 8, 2000, student's IEP team met to discuss reevaluation and to develop an IEP for the 2000-01 school year. (Ex. R-41, 42) During that meeting, Mrs. Crader and Ms. Hammon testified that student's father indicated his unwillingness to consent to any testing beyond the Brigance. The reevaluation forms prepared contemporaneously at that meeting reflect that only the Brigance would be administered consistent with student's father's limited consent. (Ex. R-41)

38. On that same date, the IEP team developed an IEP for student's eighth grade year (2000-01). (Ex. R-42) Significantly, at that meeting, the team concluded that student did not require extended school year services. (Ex. R-42 at 354, 375) The ESY decision was based on the team's determination that student's learning disability was mild and the probability for regression was no greater than that of the regular classroom student. (Ex. R-42 at 354)

39. In September 2000, student participated in a group administration of the standardized SAT-9 test. (Ex. R-89 at 484) Student scored at the fifth grade, first month level in reading on that test. (Ex. R-105)

## **Discussion:**

### **A. The District Provided Student With A FAPE During the 1999-2000 School Year.**

The Individuals with Disabilities Education Act guarantees all students with disabilities in participating states the right to a free appropriate public education ("FAPE"). 20 U.S.C. Section 1412(a)(1); 1401(8). A FAPE includes special education and related services that are individually designed to meet a disabled student's unique needs and that are reasonably calculated to provide the student with educational benefit. 20 U.S.C. Section 1414(a)(5); *Bd. of Educ. of Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982). The FAPE required by the Act is tailored to the unique needs of the disabled child by means of an individualized education program ("IEP"). 20 U.S.C. Section 1401. The IEP, which is prepared at a meeting between representatives of the state or local agency, the child's teachers, the child's parents or guardian, and where appropriate, the child, consists of a written document containing, *inter alia*, the following:

- a. a statement of the present levels of educational performance of such child;
- b. a statement of annual goals, including short-term instructional objectives;
- c. a statement of the specific educational services to be provided to such child, and the extent to which the child will be able to participate in regular educational programs;
- d. the projected date of the initiation and anticipated duration of such services; and
- e. appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

#### 20 U.S.C. Section 1401

Significantly, the IDEA does not prescribe any substantive standard regarding the level of education to be accorded to disabled children, *Rowley*, 458 U.S. at 189, 195, *Fort Zumwalt Sch. Dist v. Clynes*, 119 F.3d 607, 611-12 (8<sup>th</sup> Cir. 1997), and does not require "strict equality of opportunity or services." *Rowley*, 458 U.S. at 198; *Clynes*, 119 F.3d at 612. Rather, a local educational agency fulfills the

requirements of providing a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction." *Rowley*, 458 U.S. at 203; *Clynes*, 119 F.3d at 612. Moreover, a critical factor in determining whether a student has received FAPE when that student is receiving all or part of her education in the regular classroom is whether the student was achieving passing marks and advancing from grade to grade. *Rowley*, 458 U.S. at 203-04.

Further, the program provided by the IEP is not required to maximize the educational benefit to the child, or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 199; *Clynes*, 119 F.3d at 612. Although an educational benefit must be more than de minimis to be appropriate, *Doe v. Bd. Of Educ. of Tullahoma City Schls.*, 9 F.3d 455, 459 (6<sup>th</sup> Cir. 1993), an appropriate educational program is one that is "reasonably calculated to enable the child to receive educational benefits." *Rowley* 458 U.S. at 207. *See also Clynes*, 119 F.3d at 611. In articulating the standard for FAPE, the *Rowley* Court concluded that "Congress did not impose any greater substantive educational standard than would be necessary to make such access meaningful." 458 U.S. at 192. The Court found Congress's intent was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.*

Given this purpose, the IDEA defines a FAPE in broad, general terms, without dictating substantive educational policy mandating specific educational methods. The imprecise nature of the IDEA's mandate reflects two important underpinnings of FAPE. First, "Congress chose to leave the selection of educational policy and methods where they have traditionally resided-with state and local officials." *Daniel R.R. v. State Bd. Of Educ.*, 874 F.2d 1036, 1044 (5<sup>th</sup> Cir. 1989). Second, Congress sought to bring children with disabilities into the mainstream of the public school system. *Mark A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8<sup>th</sup> Circ. 1986); *Rowley*, 458 U.S. at 189. Thus, federal



law requires that states educate disabled and nondisabled children to "the maximum extent appropriate." 20 U.S.C. Section 1412.

The key inquiry in determining whether a district is providing FAPE is to assess "whether a proposed IEP is adequate and appropriate for a particular child at a given point in time." *Burlington v. Dep't of Educ.*, 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984), *aff'd*, 471 U.S. 359 (1985). Thus, the determination of whether an IEP is appropriate and reasonably calculated to confer an educational benefit must be measured from the time it was offered to the student. *Fuhrmann v. East Hanover Bd. Of Educ.*, 993 F.2d 1031, 1035, 1040 (3<sup>rd</sup> Cir. 1993). As noted by the *Fuhrmann* court, "(n)either the statute nor reason contenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." 993 F.2d at 1040.

In the instant case, the panel concludes that the District provided student with a FAPE in the least restrictive environment during the 1999-2000 school year. The evidence at hearing conclusively established that the April 21, 1999 IEP contained all the requisite components enumerated in the IDEA. In addition, the IEP contained goals and objectives, supplementary aides and services and modifications in all identified areas of disability and each of these components was appropriately tailored to meet student's individualized needs. More significantly, although the IDEA requires goals and objectives or related services in counseling and social skills for certain students, the evidence at hearing established that these were not areas of need for student and, thus, the IEP was not required to address these areas that indisputably were areas of strength. More importantly, although the Panel finds that the August 21, 1999 IEP provided FAPE at the time it was developed, student's report cards for the 1999-2000 school year as well as the standardized test scores on the TerraNova and SAT-9 administered in April 1999 and September 2000 respectively further demonstrate that student, in fact, made progress and received a great deal more than trivial educational benefit. Significantly, student received not only passing grades, but received A's and B's in each of the mainstreamed and special education classes

and advanced to the next grade. The fact that student received modifications in classrooms is irrelevant as the IEP team appropriately determined that such modifications were appropriate and necessary for student to receive a FAPE and Petitioners agreed with all such modifications. Moreover and most significantly, student's IEP did not require modified grading as suggested by witness Estrand. Contrary to Petitioners' assertion, student's April 21, 1999 IEP contained reading goals and objectives and it was appropriate for the team to concentrate on reading comprehension rather than word attack or phonics skills in light of student's age and grade level. Moreover, the undisputed evidence at hearing demonstrated that, during the time that student attended physical education, that coursework was adapted to be consistent with student's physical needs. Indeed, Petitioners provided no evidence to support their contention that student did not receive adaptive physical education. The only evidence adduced by Petitioners involved a personality conflict with student's physical education teacher. When brought to the District's attention, the District appropriately responded to the parents request to have student receive physical therapy in lieu of adaptive physical education.

The Panel also rejects Petitioners' contentions with respect to the failure to provide a laptop computer or the lack of explanation for vocational goals in the IEP. As a threshold matter, the Panel notes that Petitioners failed to adduce any evidence with respect to either issue. However, it is clear that the April 21 IEP appropriately addressed student's assistive technology needs. The Panel is unable to discern the precise nature of the issue regarding vocational goals and simply finds that the IEP provided Tiffany with FAPE.

The Panel also finds that the team's decision in April 1999 to remove direct language therapy as a service delivery model for student's language needs was well supported by the evidence. First and foremost, the 1997 Diagnostic Summary demonstrated that student no longer qualified for direct language therapy. In spite of evaluation data demonstrating that student no longer had that need, the IEP team continued to serve student's language needs through direct

therapy as well as CWC courses. However, in April 1999, Winnie Long (Student's long-time speech/language pathologist) determined that, on the basis of student's grades and Ms. Long's observations and records obtained in language therapy, student should no longer be served in that manner. The Panel agrees with that conclusion and notes that grades and therapists' observations are among the types of data that can be used as the basis for a change in a service delivery model. More significantly, the IEP team did not cease to serve student's language needs at that time. The team merely determined that those needs could be better served in the less restrictive environment of the CWC classroom. Notably, student's mother agreed with the change.

**A. Student Did Not Qualify For ESY For The Summer Of 2000.**

Pursuant to the IDEA federal regulations, "(e)ach public agency shall ensure that extended school year services are available as necessary to provide FAPE . . . ." In addition, pursuant to the Missouri State Plan for Part B of the IDEA, "with regard to the content of the IEP, the public agency must develop an IEP for each student which includes . . . . documentation that extended school year services were considered by the IEP committee."

Significantly, a student is entitled to ESY if it would be not merely "beneficial but . . . a necessary component of an appropriate education (for the child)." *Rettig v. Kent City Sch. Dist.*, 539 F. Supp. 68(N.D. Ohio 1981). More specifically, an ESY "would be appropriate if it would prevent significant regression of skills or knowledge retained by (the child) so as to seriously affect his progress toward self-sufficiency." *Id.* Under this reasoning, ESY is the exception and not the rule under the IDEA. *Cordrey v. Euckert*, 917 F.2d 1460 (6<sup>th</sup> Cir. 1990). Thus, "given those policy considerations, therefore, it is incumbent upon those proposing an ESY for inclusion in the child's IEP to demonstrate, in a

particularized manner relating to the individual child that an ESY is necessary to avoid something more than adequately recoupable regression." *Id.*

In the instant case, the undisputed testimony demonstrated that student's IEP team properly considered and documented that student did not require ESY for the summer of 2000. Moreover, the evidence established that student did not regress to any great degree over school breaks and recouped any such regressed skills within a typical period of time. This is evidenced by student's first quarter grades throughout student's school history as well as student's ability to maintain stellar grades and to be promoted from grade to grade. Accordingly, the team's decision as documented in the Spring 2000 IEP was legally correct and Petitioners' contentions with respect to ESY are deemed to be without merit.

**B. The Panel Has No Jurisdiction To Determine 504 Or ADA Issues.**

As consistently noted throughout the proceedings, this Panel's jurisdiction is limited solely to deciding issues raised under the IDEA. The Panel has no authority to address accessibility or disability discrimination issues predicated on Section 504 of the Rehabilitation Act or the Americans with Disabilities Act. At hearing, Petitioners presented limited evidence with respect to their accessibility issues and failed to address how those issues implicated IDEA.

Based on the evidence presented, however, the Panel finds that the broken chair lift in the Fall of 1999 and the relative lack of access to the middle school cafeteria did not deny student a FAPE under the IDEA. More specifically, the evidence presented by the District demonstrated that student continued to receive all services during the Fall of 1999 and was prohibited from accessing the middle level of the building for only approximately 1 ½ weeks. During that time, however, the District ensured that student received all necessary IEP services.

The Panel also finds that Petitioners' position with respect to the school cafeteria is similarly without merit under the IDEA. Most notably, as the District pointed out, student's IEP for the 1999-2000 school year specifically provided, at the parents request, for student to eat lunch with peers in a classroom rather than in the cafeteria. The evidence established that student did, indeed, each lunch with peers (including nondisabled peers) in a classroom in accordance with parents' request and in accordance with the IEP. At the point in time where the parents requested that student eat lunch in the school cafeteria, Mrs. Crader responded immediately and had an alternative means of access in place within a very short period of time. Thus, student was not denied access to lunch with peers nor was student denied a FAPE under the IDEA.

### **CONCLUSIONS OF LAW**

After due consideration of the evidence presented and admitted at hearing, as well as the foregoing findings and discussion, the Panel makes the following conclusions of law:

1. Student is appropriately identified as disabled under the IDEA and the Missouri State Plan for Part B of the IDEA.
2. Student qualifies for special education and related services under the IDEA.
3. The District is a legally constituted public school district within the State of Missouri. During the 1999-2000 school year, the District was responsible for providing student with a free appropriate public education in the least restrictive environment pursuant to the IDEA, its implementing regulations and the Missouri State Plan.
4. The IEP prepared for student in April 1999 to be implemented during the 1999-2000 school year was reasonably calculated to provide student with educational benefit, appropriately describes student's present level of educational performance and

contains appropriate goals and objectives consistent with that present level. In addition, the April 1999 IEP provides student with a FAPE in the least restrictive environment. 5. Student's April 21, 1999 IEP contained appropriate goals and objectives in the area of reading.

6. Student was provided with adaptive physical education prior to parents' decision to remove student from the class in January 2000.

7. The IEP team had more than sufficient data in April 1999 to determine and agree that student's service delivery model for language should be changed from direct language therapy.

8. Student's IEP appropriately determined that student did not require ESY for the summer of 2000.

9. Student did not require counseling or social skills goals as part of the April 21, 1999 IEP.

10. Student did not require the use of a laptop computer in the April 21, 1999 IEP in order to receive FAPE.

11. Student was not denied a FAPE during the Fall of 1999 when the chair lift was broken.

12. Student did have the opportunity to eat lunch with peers in the classroom as specified by the IEP and later was provided that same opportunity in the school cafeteria when parents so requested; student was not denied a FAPE under the IDEA at any time with respect to lunchroom issues.

### **DECISION**

The foregoing duly considered, it is the Panel's opinion that each of Petitioners' allegations and contentions is without merit. The foregoing duly considered, the Panel finds in favor of Respondent District with respect to all issues.

### **APPEAL PROCEDURE**

Either party has the right to appeal this decision within 30 days to a State Court of competent jurisdiction pursuant to Chapter 536 of the Revised Statutes of Missouri, or to a Federal Court.

Panel Members Support Decisions Panel Members Opposing Decision

Jean Adams

Patrick O. Boyle

Richard Staley